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September 29, 2017

VIA EMAIL OFCCP_NO_FOIA@DOL.GOV
AND U.S. MAIL

D. Lissett Geán
Special Assistant
U.S. Department of Labor
Office of Federal Contract Compliance Programs
200 Constitution Avenue, NW
Washington, DC 20210

Re: Gilead Sciences -- FOIA Request Tracking No. 838133

Dear Ms. Gean/FOIA Coordinator:

I write in response to the Office of Federal Contract Compliance Programs' ("OFCCP") September 1, 2017 letter, received on September 6, 2017, in which Gilead Sciences ("Gilead") was given the opportunity to respond to a Freedom of Information Act ("FOIA") request from Mr. Will Evans of The Center for Investigative Reporting, seeking Equal Employment Opportunity Employer Information Reports ("EEO-1 reports") submitted by Gilead for the year 2015. Gilead requests that OFCCP deny this request and objects to the disclosure of the EEO-1 reports for two primary reasons.

First, Gilead considers all of the information contained in the EEO-1 reports to be confidential commercial information, the disclosure of which would cause substantial harm to the Company's competitive position. Indeed, the EEO-1 reports would effectively provide a roadmap to our competitors. Both the case law and the Department of Labor's own decisions support denying FOIA access to the type of confidential, commercially sensitive information found in the in the EEO-1s. As a result, the disclosure of these reports should be denied under Exemption 4 of FOIA, 5 U.S.C. Section 552(b)(4), which protects "... trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential."

Second, requiring disclosure of the EEO-1 reports could hamper OFCCP's ability to collect employee information from federal contractors. Obtaining reliable employee data in the EEO-1 forms turns on a robust self-reporting regime. If employees perceive that their private information could be disclosed through the FOIA production of EEO-1 forms, their willingness to self-report and, in turn, the accuracy of those reports could be diminished. For this additional reason, OFCCP should deny the FOIA request here.

Gilead Operates in a Highly Competitive Industry

Gilead operates in the highly competitive segment of pharmaceuticals and biotechnology markets. The presence of large scale global competitors and smaller generics companies competing for each drug approval in a lucrative market ensures rivalry is strong. *Pharmaceuticals in the United States*, MarketLine, pp. 13, 20-21 (June 2017).

PAUL HASTINGS

VIA EMAIL: OFCCP_NO_FOIA@doj.gov
AND U.S. MAIL

D. Lissette Geán
September 29, 2017
Page 2

Gilead's lead products face direct competition from products marketed by GlaxoSmithKline Inc. for the treatment of HIV/AIDS. Its Hepatitis B product faces competition from products from Bristol-Myers Squibb Company and Novartis Pharmaceuticals Corporation in the U.S., the European Union, and China. The company competes primarily with products from Merck & Co., Inc. and Pfizer, Inc. for another one of its drugs. Due to such intense competition, the company faces pricing pressure and the threat of loss of market share. See *One-Stop Report: Gilead Sciences, Inc.*, Dun & Bradstreet, at p. 40 (Sept. 19, 2017).

Additionally, the global pharmaceutical industry is facing the major challenge of patent expiration in the next few years. Some of Gilead's patents related to its marketed products and products under development are expected to expire between 2019 and 2032. The loss of exclusivity of important products due to generic challenges, patent expiration and/or competition from newly patented products could affect the company's operations. *Id.*

Moreover, the American biopharmaceutical industry is the global leader in research and development and has delivered many of the treatments and cures that have saved millions of lives around the world. This is attributable, in part, to public policies that promote a highly-skilled, diverse American workforce, among other things. Efforts to support workforce diversity are critical as the U.S. faces mounting global competition as other countries are increasingly implementing similar programs and strategies focused on growing their STEM workforces. *New Reports Highlight Increasing Global Competition in Biopharmaceutical R&D, Posing Significant Challenges to Future U.S. Standing*, Plus Company Updates (June 6, 2017).

Legal Standard

A commercial or financial matter is confidential under Exemption 4 if disclosure of the information is likely: (1) to cause substantial harm to the competitive position of the person from whom the information was obtained; or (2) to impair the government's ability to obtain necessary information in the future. *Nat'l Parks and Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). Courts long have recognized that EEO-1 reports contain confidential, competitive information about an employer's workforce, and thus should not be disclosed pursuant to FOIA. See *Westinghouse Elec. Corp. v. Schlesinger*, 542 F.2d 1190, 1196 (4th Cir. 1976) (upholding district court's determination that EEO-1 reports were confidential and disclosure of them would give information of substantial value to competitors; citing district court's ruling that disclosure would reveal information of "substantial value to the plaintiff's competitors in performing cost-price analyses of plaintiffs' pricing practices, in monitoring plaintiffs' development of new products and processes, in identifying plaintiffs' customers in their consumption needs, in analyzing plaintiffs' production by product line, and in developing competitive bidding strategies to be used against the plaintiffs"); *Rubbermaid v. Kleppe*, 1976 U.S. Dist. LEXIS 12421 (D. Md. Nov. 5, 1976) (recognizing confidential nature of EEO-1 reports and competitive harm of disclosure); see also *Lion Raisins v. U.S. Dep't of Agric.*, 354 F.3d 1072, 1081 (9th Cir. 2004), *overruled in part by Animal Legal Defense Fund v. USDA*, 836 F.3d 987 (9th Cir. 2016) (affirming decision to withhold information under Exemption 4, finding that the information sought would reveal "critical information about [the companies'] volume, market share, and marketing strategy").

As explained further below, Gilead firmly believes that disclosure of its EEO-1 reports will likely reveal sensitive information of value to the Company's competitors, as well as hamper OFCCP's ability to

VIA EMAIL: [OFCCP NO FOIA@doj.gov](mailto:OFCCP_NO_FOIA@doj.gov)
AND U.S. MAIL

D. Lissette Geán
September 29, 2017
Page 3

collect meaningful employee information from federal contractors. For these two independent reasons, Gilead respectfully requests that OFCCP withhold releasing its EEO-1 reports.

I. Disclosure of Gilead's EEO-1 Reports Would Cause Substantial Harm to Gilead's Competitive Position

Commercial or financial matter is confidential for purposes of Exemption 4 if disclosure of the information is likely to cause substantial harm to the competitive position of the person from whom the information was obtained. *Nat'l Parks*, 498 F.2d at 770. As discussed below, information contained in Gilead's EEO-1 reports is confidential information and its disclosure would provide competitors with the ability to undermine Gilead's leadership in the market.

A. The Competitive Advantage Gilead Gains From Its Workforce Design Strategy Would Be Lost if Competitors Had Access to the EEO-1 Reports

Disclosure of the information contained in the EEO-1 reports will cause substantial harm to Gilead's competitive position by providing the Company's competitors with insights into Gilead's business and human resource strategies. Competitors will be able to identify changes in relative staffing levels and the mix of job categories such as professionals, sales staff and production workers. From there, competitors can gain insight into business strategies that otherwise would not be publicly available.

For example, in the last few years, Gilead has spent literally billions of dollars in acquisitions. Each of the companies acquired had distinct products requiring a skilled sales force to bring the products to market. While the fact and timing of these acquisitions generally is public information, the number of sellers Gilead uses to sell the products is not. With the information contained in the EEO-1 reports, a competitor could track changes in the composition of Gilead's sales force against when certain acquisitions occurred. From this, it may be possible for a competitor to gain insight into how Gilead is staffing its sales force for certain products; and either increase or decrease their own sales force accordingly to gain a competitive advantage against Gilead.

Moreover, labor costs are a significant factor in the Company's competitive position in the marketplace. Competitors could gain insights into how the Company manages labor costs by carefully scrutinizing the information contained in the EEO-1 reports. For example, by comparing the ratio of managerial employees (First/Midlevel Officials and Managers) to non-managerial employees, a competitor could gain insight into the management span of control used by Gilead. Competitors could correspondingly modify the management span of control in their own workforces and thereby reduce their labor costs. With these reduced labor costs, a competitor would be in a better position to underbid Gilead when competing for a client's business.

B. The Competitive Advantage of Gilead's Workforce Diversity Strategy Would Be Lost if the EEO-1 Reports Are Disclosed

Workforce diversity is more to Gilead than just a legal concept; it is a business imperative. The diversity of cultures, people, thoughts and ideas within our workforce are essential to Gilead's ability to deliver innovative, superior technologies to the marketplace. In addition, having a workforce which reflects the demographics of our clients and the communities in which we do business is critical to

VIA EMAIL: OFCCP_NO_FOIA@doj.gov
AND U.S. MAIL

D. Lissette Geán
September 29, 2017
Page 4

Gilead's overall success. To meet this business imperative, Gilead has expended substantial time, money, and resources in the recruiting, hiring, training, and mentoring of its workforce.

In *Rubbermaid*, 1976 U.S. Dist. LEXIS 12421, a FOIA request was made for workforce information the company was required to submit as a federal contractor, including the company's EEO-1 reports. Rubbermaid objected to disclosure under FOIA Exemption 4(b)(4). The court found that the documents requested were exempt from disclosure under Exemption 4. With regard to the EEO-1 reports, the court was persuaded by the company's argument that competitive harm would occur because "a competitor could identify employees with the particular skills, race, and sex it needs to meet its own minority hiring requirements. Loss of such employees would be costly because Rubbermaid would lose skilled employees, the time and money spent on recruitment and training and possibly a cohesive work force." See *id.* at *6.

Similar to *Rubbermaid*, providing Gilead's competitors with the racial and gender makeup of Gilead's employees will provide unique opportunities for them to develop strategies to raid Gilead's workforce. For example, competitors could identify where Gilead has made significant progress in hiring women and minorities and target recruitment strategies at specific job categories to steal this talent from Gilead. This not only would result in the loss of talent for Gilead and impact the Company's ability to provide services and other products to our clients, but the significant investment made by Gilead in recruiting, hiring and training its workforce would be lost as well.

At Gilead, we believe in an inclusive work environment where employees are encouraged to contribute their unique talents, skills and distinct perspectives. We know we are a stronger company and that innovation flourishes when we are informed by a diverse set of backgrounds, experiences and points of view. Diversity of thought and expertise helps Gilead achieve the company's organizational goals. If competitors can target their recruiting of Gilead's diversity talent by accessing information in the EEO-1 reports, Gilead's competitive advantages will be diminished. It will impact the Company's ability to successfully bid on new work. It also will impact Gilead's ability to attract new employees which in turn will interfere with the Company's efforts to meet its obligations as a federal contractor to recruit a diverse workforce.

C. OFCCP and DOL Have Refused to Disclose EEO-1 Reports of Other Contractors' EEO-1 Reports in Nearly Identical Circumstances

OFCCP has already determined that disclosure of employers' EEO-1 reports in response to a media outlet's FOIA request will cause competitive harm to the employers and is precluded under FOIA Exemption 4. Those determinations have been upheld on appeal to the Solicitor of Labor.

In 2008, the *San Jose Mercury News* requested disclosure of EEO-1 reports from companies in the information technology industry. In order to protect their confidential information and competitive position, companies such as Google, Apple, Yahoo, Oracle, and Applied Materials objected to the requests. OFCCP agreed with the companies and found that the EEO-1 reports were protected from disclosure under FOIA Exemption 4.

Despite OFCCP's finding, the *Mercury News* appealed. OFCCP was upheld on appeal. According to reports published by various media outlets, DOL concluded in its notice of final action that "[s]uch data can demonstrate a company's evolving business strategy[.]" DOL went on to state that "[t]he companies have articulated to us that they are in a highly competitive environment in which less mature

VIA EMAIL: OFCCP_NO_FOIA@doj.gov
AND U.S. MAIL

D. Lissette Geán
September 29, 2017
Page 5

corporations can use this EEO-1 data to assist in structuring their business operations to better compete against more established competitors." See Mike Swift, *Five Silicon Valley companies fought release of employment data, and won*, Mercury News (Feb. 11, 2010 at 4:52 am) (quoting DOL Associate Solicitor William W. Thompson II).

The Mercury News request presents nearly identical circumstances as the current request. The Mercury News was seeking disclosure of EEO-1 reports — the same information sought in the current request. Although the companies at issue were in a different sector, the concerns of competitive harm flowing from disclosure in the Mercury News matter are the same concerns shared by Gilead. Applying its earlier logic, OFCCP should reach the same result here.

II. Disclosure of EEO-1 Reports Will Hamper OFCCP's Ability to Collect Meaningful Employee Information from Federal Contractors

Another reason to sustain Gilead's objection is the adverse effect routine disclosure of companies' EEO-1 reports may have on the government's efforts to collect this information. See *Hersh & Hersh v. U.S. Dep't of Health and Human Servs.*, 2008 WL 901539, at *7 (N.D. Cal. Mar. 31, 2008) (upholding withholding of documents under Exemption 4 where disclosure of documents would "impair the government's ability to secure voluntary execution" of information disclosures in the future).

Although Gilead understands it is required to submit annual EEO-1s, the availability and accuracy of data in the reports is based fundamentally on the willingness of each employee to provide voluntarily his or her demographic data. In an environment where privacy concerns are often at the forefront of the average employee's mind, employees may be reluctant to provide any information which they are not required to provide (including race and gender data that federal contractors must solicit, but cannot force employees to provide). And while the likelihood of anyone's personal identity becoming discernable from EEO-1 data may be remote, the perception of the employee is what matters in this context. When balancing the personal benefit of voluntarily providing personal information against the potential drawbacks which individuals may perceive will flow from the government disclosing the information publicly, there simply is no compelling reason for an employee to voluntarily provide any personal information.

III. Conclusion

As the discussion above makes clear, there are significant negative consequences — both for Gilead and OFCCP — in disclosing EEO-1 reports. FOIA Exemption 4 is designed specifically to avoid these consequences. It protects an employer from having confidential information disclosed. Consequently, Gilead respectfully requests that the FOIA request for the Company's EEO-1 reports be denied.

VIA EMAIL: OFCCP_NO_FOIA@doj.gov
AND U.S. MAIL

D. Lissette Geán
September 29, 2017
Page 6

Gilead's Responses to the Agency's Questions

Gilead responds to the agency's specific questions, as follows:

1. ***What specific information do you consider to be a trade secret or confidential commercial information?***

Gilead's EEO-1 reports contain confidential information, including the number of its employees, the types of positions they hold, the span of managerial control, and the distribution of those employees within and across its business units and geography.

2. ***How would disclosure of this information be valuable to your competitors? (Indicate the nature of the harm to your competitive position that would likely result from disclosure of this information.)***

The disclosure of Gilead's EEO-1 reports would provide valuable information to competitors in that it would allow them to gather information about Gilead's organization, workforce design, and diversity strategy, and use it to their advantage.

Moreover, workforce composition is directly linked to company profitability. As detailed above, revelation of Gilead's EEO-1 reports would give valuable insight into its focus and growth plans and human resources strategies. The make-up of Gilead's workforce ties directly into its business strategy. Thus, the disclosure of this information would give competitors a direct competitive advantage. Further, viewing the EEO-1 reports would also provide competitors with insight into Gilead's strategies for dealing with particular market conditions and technological innovation, thus allowing competitors to adjust their own business strategies in response.

3. ***To what extent is this information known to the public or your competitors in products, articles, patents, or other means? If it is known, why would release of the information nevertheless be competitively harmful?***

Gilead routinely declines requests for disclosure of the type of information contained in the EEO-1 reports. This information is not known to the general public or Gilead's competitors.

4. ***What steps have been taken to protect the confidentiality of the data contained in your EEO-1 Reports?***

Gilead discloses its EEO-1 reports to the Joint Reporting Committee. These reports are not released to the general public, and they are released to individuals within the Company only on a need-to-know basis.

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VIA EMAIL: [OFCCP NO FOIA@doj.gov](mailto:OFCCP_NO_FOIA@doj.gov)
AND U.S. MAIL

D. Lissette Geán
September 29, 2017
Page 7

Please let me know if you have any questions.

Very truly yours,



Tammy R. Daub
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